DOCUMENT RESUME

ED 083 997 LI 004 536

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TITLE	Photocopying in Swedish Schools.
INSTITUTION	Ministry of Education, Stockholm (Sweden).
PUB DATE	31 Aug 73
NOTE	10p.;(0 references); Reprinted by the Council of Europe, Council for Cultural Co-operation, Strasbourg, France, (DECS/Inf (73) 9)
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	*Copyrights; Foreign Countries; Legal Problems; *Public Schools; *Reprography
IDENTIFIERS	*Sweden

ABSTRACT

To what extent and on what conditions may copies of literary and artistic works be made for educational purposes? In Sweden the main provisions pertaining to this matter are to be found as from 1 July 1973, in a special agreement and no longer in law. The agreement refers also to the right to make copies of photographs for the schools. The above-mentioned agreement is probably the first of its kind and is therefore described in this document. Copies of literary and artistic works as well as of photographs have for a long time been made on a considerable scale within the frame of the educational system in Sweden. This copying has generally been made without the consent of the persons entitled to grant the right to photocopying (the title-holder). The legal support in the Swedish Copyright Act and Photography Act being considered insufficient, negotiations began in 1967 to regularize questions of copyright within the frame of the educational system. These negotiations have resulted in an agreement concerning graphic and photographic reproduction for the schools. As regards copying at the universities the negotiations are still going on. (Author/SJ)

ED 083997

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg 31 August 1973

DECS/Inf (73) 9
English only

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PHOTOCOPYING IN SWEDISH SCHOOLS

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By courtesy of the Swedish Ministry of Education and Cultural Affairs and the author, we reproduce the following report on an agreement concluded in Sweden which as from 1 July 1973 regulates the copyright problems involved in photocopying in schools - problems which are of great concern to documentation centres, school administrations and teachers in many countries.

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To what extent and on what conditions may copies of literary and artistic works be made for educational purposes? In Sweden the main provisions pertaining to this matter are to be found as from 1 July 1973, in a special agreement and no longer in law. The agreement refers also to the right to make copies of photographs for the schools.

The above-mentioned agreement is probably the first of its kind and merits therefore a brief account and commentary.

BACKGROUND

Copies of literary and artistic works as well as of photographs have for a long time been made on a considerable scale within the frame of the educational system in Sweden. From a study carried out in 1968 it appears that during the school year 1968-69 150 million copies were made within the frame of the educational system universities and colleges excluded. Of the copies made, a good 60% referred to educational literature, about 8% to specialist literature, about 14% to newspapers and other periodicals, about 3% to belles lettres, about 1% to musical scores, about 1% to works of drawing or painting and about 2% to photographs.

This copying has generally been made without the consent of the persons entitled to grant the right to photocopying (the title-holder). The legal support in the Swedish Copyright Act and Photography Act being considered insufficient, negotiations began in 1967 to regularise questions of copyright within the frame of the educational system. These negotiations have resulted in an agreement concerning graphic and photographic reproduction for the schools. As regards copying at the universities the negotiations are still going on.

ACCOUNT OF THE AGREEMENT

Parties to the Agreement

The Agreement has been concluded between the state and 17 Swedish organisations including associations of authors, book publishers, newspaper editors, journalists, suppliers of pictures, photographers, press photographers, artists, illustrators and cartoonists, composers and music publishers.

Zone of application of the Agreement

The Agreement refers to the compulsory comprehensive school. It also covers all the practical or theoretical training based directly on the comprehensive school, (for instance in the integrated upper secondary school), training for the unemployed as well as certain training for teachers. The universities, private educational activities and the voluntary popular education carried out by independent educational associations are on the other hand not covered by the Agreement.

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Every conceivable graphic and photographic method for the reproduction of literary and artistic works and of photographs falls under the terms of the Agreement except for copying made by a film camera. The question as to whether copying by a film camera is permitted will thus - as was the case before the Agreement came into being - be decided solely in the light of the Copyright Act and the Photography Act.

In practice the Agreement will apply chiefly where it is a matter of copying written matter and pictures of various kinds by photocopying. What will be said below concerning photocopying applies according to the Agreement in principle also to other kinds of reproduction.

The Agreement applies to all kinds of literary and artistic works as well as to photographs. A necessary prerequisite for the application of the Agreement to a certain literary or artistic work or a certain photograph is that the term of protection according to the Copyright Act or the Photography Act prevails.

A further prerequisite for the application of the Agreement to a certain literary or artistic work is that the work shall have been published. And as regards photographs, these too must have been published. This means, inter alia, that the Agreement does not refer to copies from a manuscript, or from educational material that a teacher produces himself for a certain lesson. On the other hand, the Agreement does cover the case in which a teacher wants to copy pages from a book he has himself had published.

For the application of the Agreement to a published literary or artistic work or to a published photograph it will furthermore be required that the title-holder has authorised a contracting organisation to grant the right of photocopying on his behalf.

On conclusion of the Agreement, the parties were agreed that it is of an imperative interest for the schools that the organisations should take effective steps to ensure that all the title-holders give someone of the organisations the requisite powers of attorney. The organisations have, moreover, in the Agreement engaged to act continuously towards this end.

Furthermore, the Agreement gives the state the right to give notice of termination of the Agreement during the period of Agreement. This applies if the contracting organisations are not able to prove that they represent a certain minimum number of title-holders. If such proof is not forthcoming upon request from the state, the state may terminate the Agreement. This right refers to those title-holders who are considered to be especially important for photocopying in schools, viz. 1) the authors of

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current works intended for educational purposes in schools, 2) journalists, 3) book publishers and 4) editors of daily newspapers. As regards the authors mentioned and journalists, 95 per cent accession to the Agreement is required. Associated book publishers and newspaper editors must be responsible for 95 per cent of the publishing of books and the editing of daily newspapers.

In the light of this, the relevant State authorities have considered themselves able to count on almost all the affected title-holders handing in powers of attorney. In view of these circumstances it should, in the opinion of the parties, be possible to restrict the control in connection with the photocopying in the schools to the question of whether a prohibition of photocopying with the support of the Agreement has been communicated concerning the literary or artistic work or the photograph that the teacher in the specific case wants to photocopy. The contracting organizations have to give the schools the necessary information for such a control. If the control is restricted in the way indicated above it cannot, according to the parties, be avoided that photocopies will be made also of literary or artistic works or of photographs that are not covered by the Agreement. However, such photocopying will in the unanimous opinion of the parties be of a relatively limited extent. The State authorities have in connection with the negotiations for the Agreement declared their intention to treat the photocopying in the schools taking place by the side of the Agreement as if it were a matter of photocopying according to the Agreement. The State will thus make the prescribed payment for it. On the other hand the organizations have undertaken in the Agreement to pay, on request, the amount due to the title-holder whose literary or artistic work or photograph has been photocopied with the support of the Agreement despite the fact that he is not bound by the Agreement.

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The Agreement is in a large measure applicable also to foreign literary and artistic works and to foreign photographs. The contracting organisations have, however, declared that they are not entitled to grant the right to photocopy literary or artistic works or photographs published only abroad or signed articles in a Swedish newspaper written by a foreigner. Thus the Agreement does not hold good for such works and photographs.

The Agreement refers to the photocopying that the teachers need for their tuition in the schools. The Agreement does not, on the other hand, refer to the photocopying that may otherwise be needed in the schools, eg for information to the staff.

The Agreement does not restrict the right to quote, currently in force.

The teachers' right to make photocopies

According to the Agreement every teacher has the right to make photocopies that he needs for his own teaching activities without the consent of the title-holder. If a teacher wants to make at the most three photocopies of a literary or artistic work (photograph) or part of such a work, no restrictions apply.

On the other hand certain special regulations apply for sets of more than three photocopies of the same text or picture. First, the teacher may only photocopy for his own tuition. There is, however, nothing to prevent the teacher from commissioning somebody else, eg the caretaker, a pupil or other teacher, to do the actual photocopying. Secondly, the total number of copies may only be as great as is needed for the teacher's own tuition. This implies that he may make at most one photocopy of the same text or picture for each pupil and the number of photocopies of the text or picture that he needs for his own part. Thirdly, only current needs may be met, ie the teacher must need the copies during the calendar half-year during which the photocopying is done. Fourthly, the need must exist despite the fact that there is on the school premises normal access to teaching aids. This implies that photocopying may not be resorted to in order wholly or in part to replace the teaching aids that ought normally to be available on the school premises. This imposes a certain restriction of the right to make photocopies from text books.

On the other hand, photocopying from other books, from newspapers and other periodicals is probably almost never restricted by the regulation in question, as all photocopying from such works is always done to supplement what may be considered to be normal access to teaching aids. It may in certain cases be difficult to decide whether the requirement of normal access to teaching aids is met. The decisive factor must here be pedagogical considerations. Also the market supply of teaching

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aids is met. The decisive factor must here be pedagogical considerations. Also the market supply of teaching aids is of great importance. The following example may according to the Contracting Parties serve as a guideline. If for a certain subject in a certain year's course there are several acceptable textbooks, the requirement of normal access to textbooks in this subject and in this year's course is always met as soon as every pupil has at his disposal a copy of one of the textbooks mentioned. The pupils do not need to have at their disposal teaching aids covering the whole course of study.

The four special regulations mentioned apply to periodicals as well as non-periodicals, irrespective of whether they are available at the publisher's or the school supplier's and irrespective of the purchase price.

As regards sets of more than three photocopies of the same text or picture, the Agreement includes some special regulations concerning photocopies of such literary and artistic works which are published in a book or in any other way than in a periodical paper. These regulations, which the contracting organisations consider as highly important, apply only if the work is available at the publisher's or the supplier's from which the school normally gets its teaching aids. According to these regulations the teachers may, in the first place, normally not photocopy such a work or part of it, if it costs or may be presumed to cost at the most three Swedish crowns. By inserting the word "normally" the parties indicate that exemptions are possible. Such an exemption has been provided for works distributed free of charge, eg advertising brochures and information material from organisations and political parties. In the second place the teacher may not normally for the same pupils make photocopies of more than half of such a work and normally not more than 20 pages of the work. By inserting the word "normally" the parties have also here wanted to indicate that in certain cases the photocopying may refer to more than half of such a work or more than 20 pages. This is anticipated for cases in which it is needed, if the photocopying is to be meaningful. If, for instance, there is a need to photocopy a certain section (chapter or the like) and this covers one or a few more pages than the half of the work or 20 pages, the whole section may be photocopied.

Personal and non-profit aspect of copyright

Concerning the personal and non-profit aspects of the author's right it is stated in the Agreement that the teacher shall be considered to have fulfilled his obligations, if on the photocopy or orally he gives or mentions the name of the author. If the teacher does not know his name he does not need to endeavour to ascertain it.

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Payment for photocopying

The state shall pay for photocopying according to the Agreement. In determining the remuneration, sets of at the most three photocopies of the same text or picture are in principle not included. Sets of more than three photocopies of the same text or pictures are, on the other hand, always subject for remuneration. In this connection payment is made for the whole set, thus also the first three copies. The remuneration is calculated - with a certain rounding off - at the rate of 0.01 Swedish crown per copy page. For a copy page from a newspaper, however, remuneration is calculated at the rate of 0.03 Swedish crown, for copy page with musical score 0.05 Swedish crown and for slides covering more than half pictorial material 0.3 Swedish crown. Photocopy from a newspaper is more costly because the amount of text on the same surface is in general larger in a newspaper than in a book. Payment for slides of pictorial material has been determined with a view to the fact that such a slide in general is used instead of a large number of ordinary photocopies.

This payment is to be made to a special organisation, called BONUS, formed by the contracting organisations. The statutes of BONUS are to be ratified by the Swedish Government. Representatives of the state and of organisations of the municipalities (the sponsors of the schools) may be appointed to the board of BONUS.

For photocopying in the schools prior to 1 July 1973, the state shall pay to BONUS 750,000 Swedish crowns. In return the contracting organisations undertake to try to settle claims from title-holders referring to copying before that date. The organisations will when doing so use money out of this fund.

In the Agreement there is no specification of the ends for which the remuneration paid out by the state is to be used; the contracting organisations will jointly decide on the amount to be allotted to each contracting organisation. It will then be the business of each contracting organisation to decide on the distribution of the amount it has received. The organisations have stated that the money will in the main be used for collective ends and that - except for the case of certain composers - they will not be distributed between the title-holders in proportion to the number of photocopies made of each title-holder's literary or artistic works or photographs.

The payment to BONUS is to be based on statistics compiled every third year and then covering a six-minth period, based on reports from about 10% of the schools involved. Through the statistics, data are collected concerning the total number of photocopies and the distribution of this total number among twelve different categories of originals. As examples of such

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categories may here be mentioned newspapers, other periodicals, belles lettres, specialist literature, textbooks, photographs and musical scores. Through the distribution of the photocopies made among different categories the contracting organisations get the necessary basis for their internal distribution of the amount paid by the state. During the first accounting period, the second half-year of 1973, certain further data are given for making it possible to identify newspapers, other periodicals, textbooks and musical works which have been photocopied. Apart from this, the state is not obliged to give information for the identification of newspapers, other periodicals, books, pictures, musical scores or other literary or artistic works.

Period of agreement

The Agreement applies for a period of three years as from 1 July 1973 and will be prolonged by five years unless notice is given to the contrary.

In the event of essentially changed conditions, negotiations for adjustment of the Agreement may be initiated. This rule does not, however, prevent the schools from limiting their photocopying.

COMMENTS ON THE AGREEMENT

The Agreement must be seen against the following background. In past years a very large number of photocopies have been made in the educational system in Sweden without the consent of the title holders. A considerable part of this photocopying has been done without the support of the regulations currently in force in the Copyright Act and the Photography Act. It is clear, moreover, that the schools affected by the Agreement need, for educational purposes, to be able to photocopy on a large scale, and that this need cannot be completely met within the legal provisions mentioned. Furthermore, it is not practical to get the requisite consent from the title holder in every individual case of photocopying. Finally, the more precise impact of the mentioned legal provisions is unclear; it is not possible to indicate the exact number of photocopies that may be made.

This situation has in every quarter been recognised as unsatisfactory and untenable. It might have been possible to resolve the difficulties by amending the law. Such an amendment of the law with a view to the content of the Berne Convention has been considered impossible. There remained, accordingly, no other possibility than to attempt to arrive at an agreement with organisations representing the title holders involved. A prerequisite for the application of such an agreement, which is indispensable for the state and the contracting organisations, has been and remains that the organisations must represent practically all title holders. To secure this the Agreement imposes on the contracting organisations, as already mentioned, to try continuously to see to it that all the title-holders involved send in the requisite powers of attorney and to give certain guarantees with respect to their representativeness.

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Certain special problems will, of course, arise with regard to foreign literary and artistic works. They have not been solved in the Agreement except in those cases in which the title holders are represented by some contracting organisation. As the Agreement does not include the universities, this problem, however, carries little practical importance.

It will in practice be impossible for the schools to avoid all photocopying of material not covered by the Agreement. To avoid such unlawful photocopying would require an extremely cumbersome administrative body. At every photocopying it would be necessary to ascertain - by control of registers covering the members of the contracting organisations - whether the title-holder affected was bound by the Agreement or not. A further requirement would be that the registers needed in every school should be kept constantly up to date. The Parties to the Agreement have agreed that such control measures are not to be adopted, as the Parties have realised that such a control would be all too costly. It is also to be feared that if prescribed such a control could in practice not be lived up to. The Parties therefore reckon with the production of a certain number of photocopies by the side of the Agreement. The state will make payment for these photocopies on the same basis as other copies. The organisations will in return offer, from the funds they receive, payment to the title-holders involved. Even on this point it should be kept in mind that the organisations have engaged to try continuously to see to it that all the title-holders involved send in the requisite power of attorney.

Although a certain quantity of photocopies may be made in the schools without the requisite support in law or in the Agreement, this quantity will doubtless be much lower than the quantity of photocopies that were made without such support before the Agreement. That it is not in practice possible to guarantee 100% observation of the Agreement has not been regarded as a reason for not concluding the Agreement.

Through the Agreement, the right of the schools to make photocopies has in certain respects been limited. This must be seen against the background of several circumstances. Thus, a considerable production of teaching aids through photocopying can have the effect that the editions of printed teaching aids are reduced. This in its turn results in losses for authors and publishers, but also in augmented prices for the schools when purchasing printed teaching aids, and possibly in the long run in a reduced supply of printed teaching aids. Furthermore, it should be noted that a large-scale production of teaching aids by photocopying of, eg, books can become more expensive than by purchase of the said books.

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An Agreement concerning the photocopying in the schools presupposes the existence of a certain system for giving an account of the copying actually done. The question of what form such a system of accounting should take was a very great stumbling block during the negotiations. In principle every title-holder - as the organisations also pointed out - is entitled to a remuneration that is directly related to the number of photocopies that have been made of his works or photographs over and above the number of photocopies that may be produced without payment. To determine such remunerations to all the title-holders would involve an accounting of every single copying occasion during the whole period of agreement. Such accounting would have been extremely time-consuming and therefore costly for both the state and the title-holders. These costs might well be so great that many title-holders - especially those whose works or photographs had only been copied in a limited number - would scarcely receive any net amount at all.

During the negotiations the representatives of the state declared that such a comprehensive accountability could not be accepted. The organisations finally found it most compatible with their interests not to demand remuneration to every individual title-holder in direct proportion to the number of photocopies made of his literary and artistic works and photographs. Against this background and also for other reasons the organisations finally accepted a considerably simpler system of accounting than that they originally demanded.

In order to simplify the accounting, the state undertook to pay despite the fact that the majority of the schools involved have municipal sponsors. For the same reason the Parties agreed to round off the number of photocopies accounted for to whole lots of 5 million photocopies and to restrict the accounting to a 6-month period every third year covering 10% of the schools involved.

The accounting cost, which for the first accounting period (the second half-year of 1973) is estimated at nearly 200,000 Swedish crowns, will be met by the state without deduction from the remuneration agreed upon.

The amount of the remuneration is on the whole to be seen as a result of the negotiation, ie a sum that both the Parties, each for its own reasons, have found acceptable. It is thus not based upon any specifically reported methods of calculating.

The Agreement clarifies the scope and extent of the right to photocopying for educational purposes in the schools and gives the schools the right to photocopying that they need. On the other hand the title-holders obviously consider that the Agreement looks after their interests too. However, both Parties are aware that unsuspected problems may arise and therefore regard the Agreement as an experiment.

The Agreement is based on the conditions in Sweden and it is to a certain extent to be seen as an experiment. This must, however, not hide the fact that the Agreement is a pioneering attempt. The experience of the Agreement and of its application would obviously be of great interest to all countries faced with similar problems.